UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PAUL STEMPLE, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

QC HOLDINGS, INC.,

Defendant.

Case No. 12-cv-01997-BAS(WVG)

CLASS ACTION

ORDER:

(1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION (ECF NO. 39);

(2) DENYING DEFENDANT'S *EX PARTE* MOTION TO STRIKE PLAINTIFF'S NOTICE OF ERRATA (ECF NO. 47); AND

(3) DENYING DEFENDANT'S MOTION TO STRIKE THE REPORT AND TESTIMONY OF ILYA EVDOKIMOV (ECF NO. 51).

Presently before the Court is a motion to certify a Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"), class action filed by Plaintiff Paul Stemple ("Plaintiff"). (ECF No. 39.) Defendant QC Holdings, Inc. ("Defendant") opposes certification primarily arguing that individualized issues pertaining to prior express consent defeat the "commonality" requirement in Federal Rule of Civil

Procedure 23(a) and the "predominance" requirement in Rule 23(b). (ECF No. 54.) In addition, Defendant also argues: (1) the proposed class is not ascertainable in part because cell phone numbers could have changed over time, (2) class action is not a superior method of adjudication because the plan for noticing the class is unworkable, (3) Plaintiff cannot adequately represent the class because he has a felony conviction, and (4) Plaintiff's request for hybrid certification under both Rule 23(b)(2) and Rule 23(b)(3) is improper. In his reply, Plaintiff suggests that the class definition could be amended by the court *sua sponte* to exclude any prior loan applicants, thereby negating Defendant's main argument regarding prior express consent.

Finally, Defendant moves to strike Plaintiff's Errata ostensibly amending Plaintiff's expert's testimony as an improper Notice of Errata (ECF Nos. 46, 47) and moves to strike all of Plaintiff's expert's testimony as unreliable under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (ECF No. 51).

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the reasons set forth below, this Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Class Certification (ECF No. 39). The Court **GRANTS** Plaintiff's Motion for Class Certification under Rule 23(b)(3) with the Court's modification to the class definition as discussed below, and **DENIES** Plaintiff's Motion for Class Certification under Rule 23(b)(2). The Court further **DENIES** Defendant's *Ex Parte* Motion to Strike Plaintiff's Notice of Errata and Declaration of Ilya Evdokimov in support thereof (ECF No. 47) and **DENIES** Defendant's Motion to Strike the Report and Testimony of Ilya Evdokimov in support of Plaintiff's Motion for Class Certification (ECF No. 51).

I. STATEMENT OF FACTS

Defendant QC Holdings, Inc. is a company that provides short-term (payday) loans to applicants. (ECF No. 1 at ¶ 5; ECF No. 54 at p. 4.) Applicants for a short-

term loan are required to fill out a loan application. (ECF No. 39 at Exh. F; ECF No. 54 at p. 4.) As part of the loan application, applicants are required to provide contact telephone numbers and give express consent to be contacted at these telephone numbers, cellular or not, via an automated telephone dialing system ("ATDS") or not, for purposes of debt collection. (ECF No. 39 at Exh. F; ECF No. 54 at p. 4, Exh. D; ECF No. 72 at Exhs. B, C (sealed).) Applicants are also required to give "Employment" information, including Employer's name, telephone number and address, and "Contacts" information, including but not limited to, current landlord and "nearest relative not living with you" together with telephone contact information for these individuals. (ECF No. 39 at Exh. F; ECF No. 54 at p. 4, Exh. D; ECF No. 72 at Exhs. B, C (sealed).)

One of the applicants for such a short-term loan provided Plaintiff's name and cellular telephone number as his Employer under the Employment section of his loan application. (ECF No. 39 at p. 3; ECF No. 39-16; ECF No. 54 at pp. 5-6; ECF No. 72-3 (sealed).) Plaintiff was not an applicant for a loan himself (ECF No. 54 at p. 1) and alleges he never provided his telephone number to Defendant nor gave any consent to Defendant to be contacted on his telephone. (ECF No. 1 at ¶¶ 9, 10, 18.) Nonetheless, according to Plaintiff, when attempting to collect a debt from this applicant, Defendant repeatedly contacted Plaintiff via an ATDS in violation of the TCPA. (*Id*. at ¶ 12.)

A. Identification of the Class

In his original moving papers, Plaintiff proposes that the class be defined as follows:

> All persons whose 10-digit cellular telephone numbers with a California area code were listed by an account holder in the Employment and/or Contacts fields of a California customer loan application produced to [Defendant], which were called by [Defendant] using an [ATDS] and/or an artificial or prerecorded voice for the purpose of collecting or attempting to collect an alleged debt from the account holder, between August 13, 2008 and August 13, 2012.

(ECF No. 39-1 at p. 4.) Plaintiff proposes identifying this class by extracting all of the ten-digit cellular telephone numbers listed in the Employer or Contact sections of the California loan applications produced in discovery and then cross-referencing this list with the list of California cellular telephone numbers identified by Defendant as being called for debt collection between August 2008 and August 2012. (*Id*. at pp. 9-11.) In other words, any owner of a California cellular telephone number listed by a loan applicant in the Employer or Contact sections and then called by Defendant using an ATDS would be a member of the class.

In opposition, Defendant argues that this proposed class might include individuals who are also applicants and who had thus provided express prior consent to be contacted for purposes of debt collection. (ECF No. 54 at pp. 11-14.) Defendant identifies two potential groups this might encompass. First, Defendant points to examples where applicants had put the same numbers in the Personal section of the application as they had in the Employer section. (*Id*. at p. 11-12.) These applicants expressly consented to be contacted on their personal cell phone, even though they later repeated the number in the Employer section. (ECF Nos. 54 and 72 at Exhs. I-N.) Second, Defendant argues there might be individuals who are applicants but are also listed as an Employer or Contact on another applicant's application. (ECF No. 54 at pp. 13-14.) Defendant points to two examples where an applicant is also a relative contact in the Contact section of another loan applicant. (ECF Nos. 54 and 72 at Exhs. B and P, Q and R.) Finally, Defendant argues that individuals can, under certain circumstances, provide prior express consent to be called at a telephone number other than their own, so the individual factual circumstances surrounding each applicant's relationship with the third party is necessary to determine consent. (ECF No. 54 at pp. 14-15.)

In response, Plaintiff suggests that the proposed class definition could be modified by the Court *sua sponte* to exclude calls to Defendant's customers. (ECF No. 61 at p. 2, n. 2.)

B. Expert Testimony of Ilya Evdokimov

In support of his Motion for Class Certification, Plaintiff retained Ilya Evdokimov, a contractor with Electronic & Speech Discovery, Inc. to extract cellular telephone numbers from the loan applications and then, using computer software, to compare them to the cellular telephone numbers called by Defendant to collect debts. (ECF No. 39-1 at pp. 10-11; ECF No. 39-13.)

In a Declaration attached to Plaintiff's Motion for Class Certification, Mr. Evdokimov testified that the numbers in the Employer and Contact sections of the loan applications were manually entered into computers and then run against the numbers provided by Defendant as those numbers called by an ATDS for debt collection. (ECF No. 39-13 ("Evdokimov Decl.") at ¶¶ 3-5, 7; ECF No. 39-2 at ¶ 7-12.) Mr. Evdokimov testified the comparison resulted in 14,635 matches. (Evdokimov Decl. at ¶ 7.)

After this Declaration was filed, Plaintiff filed a Notice of Errata. (ECF No. 46.) Attached to the Notice of Errata was a Declaration from Mr. Evdokimov stating that in the process of testifying he had come to realize that data had been inputted incorrectly in that only cellular telephone numbers from the "Contacts" section of the loan applications had been manually entered, not the "Employment" section. (ECF No. 46-1 at ¶ 3.) He corrected the problem and had the "Employment" section numbers added to the comparison. (*Id.*) The resulting matches were increased to 20,075. (*Id.*)

After receiving Defendant's Opposition to the Motion for Class Certification, objecting that this process could include Defendant's customers, Plaintiff then requested that Mr. Evdokimov take the above revised matches and remove any cellular telephone numbers of applicants that were listed in the "Personal" section of the applications. (ECF No. 61 at p. 2; ECF No. 61-1 ("Evdokimov Reply Decl.".) According to Plaintiff, this would modify the class to avoid Defendant's concern that the class may include applicants who had given express prior consent to be contacted.

(ECF No. 61 at p. 2, n. 2.) When Mr. Evdokimov made this modification, he testified he obtained 6,387 matches. (Evdokimov Reply Decl. at ¶ 9).

II. STATEMENT OF LAW

A. Certification of Class Under Federal Rule of Civil Procedure 23

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). In order to justify a departure from the usual rule, a party seeking class certification must satisfy all of the requirements under Rule 23(a) of the Federal Rules of Civil Procedure, and at least one of the categories in Rule 23(b). *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013); *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). A class may be certified only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). The merits of the class members' substantive claims may be highly relevant to determining whether to certify a class and "'a district court *must* consider the merits' if they overlap with Rule 23(a)'s requirements." *Wang*, 737 F.3d at 433 (quoting *Ellis*, 657 F.3d at 983). "The same analytical principles govern Rule 23(b)." *Comcast v. Behrend*, 133 S.Ct. 1426, 1432 (2013). The burden is on the plaintiff to establish that the Rule 23(a) and Rule 23(b) requirements have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

As a preliminary matter, "and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009). Although the exact identities of the class members need not be specified at the class certification stage, "the proposed class must be sufficiently definite in order

to demonstrate that a class actually exists." *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580 (N.D. Ill, 2005); *see also Mazur*, 257 F.R.D. at 567; *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) ("[A] class will be found to exist if the description of the class is definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member."). Once a plaintiff has established that a class is actually ascertainable, then it must show that the Rule 23 requirements have been met. *Id.*

"Rule 23(a) provides four prerequisites that must be satisfied for class certification: (1) the class must be so numerous that joinder of all members is impracticable ['numerosity']; (2) questions of law or fact must exist that are common to the class ['commonality']; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class ['typicality']; and (4) the representative parties must fairly and adequately protect the interests of the class ['adequacy']." *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008) (citing Fed. R. Civ. P. 23(a)).

"A plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication." *Otsuka*, 251 F.R.D. at 443-44 (citing Fed. R. Civ. P. 23(b)). In this case, Plaintiff seeks certification under both Rule 23(b)(2) and Rule 23(b)(3).

1. *Numerosity – Rule 23(a)(1)*

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer." *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007).

2. *Commonality – Rule 23(a)(2)*

Under Rule 23(a)(2), the named plaintiff must demonstrate that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). However, "[a]ll questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*

Commonality does not turn on whether common issues are raised, "'but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Wang*, 737 F.3d at 543 (quoting *Wal-Mart*, 131 S.Ct. at 2551) (emphasis in original). Determination of the truth or falsity of a common contention must "'resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1041-42 (quoting *Wal-Mart*, 131 S.Ct. at 2551).

3. *Typicality – Rule 23(a)(3)*

To satisfy Rule 23(a)(3), the named plaintiff's claims must be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality requirement is "permissive" and requires only that the named plaintiff's claims "are reasonably coextensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

"[C]lass certification should not be granted if 'there is a danger that absent

class members will suffer if their representative is preoccupied with defenses unique to it.'" *Id.* (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

4. *Adequacy – Rule 23(a)(4)*

Rule 23(a)(4) requires that the representative plaintiff "will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). "To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

It may be proper for the court to consider a proposed class representative's integrity in assessing his adequacy as a class representative. *In re Proxima Corp. v. Sec. Litig.*, 1994 WL 374306, at *17 (S.D. Cal. May 3, 1994). Thus, courts have determined a proposed representative was inadequate when he admitted a role in committing securities fraud. *Id.; cf. Meyer*, 707 F.3d at 1042 (although the proposed class representative had a conviction for dishonesty, he was still deemed an appropriate representative since the conviction was more than ten years old and representative had taken positive steps since the conviction).

5. *Injunctive Relief – Rule 23(b)(2)*

Rule 23(b)(2) requires a plaintiff to establish that the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Claims for individualized monetary relief belong in a Rule 23(b)(3) certification, not under Rule 23(b)(2). *Wang*, 737 F.3d at 544

(citing *Wal-Mart*, 131 S.Ct. at 2558).

6. *Predominance – Rule 23(b)(3)*

Rule 23(b)(3) requires the court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The predominance inquiry focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" In *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), the Ninth Circuit noted:

> Rule 23(b)(3)'s predominance and superiority requirements were added to cover cases in which a class action would achieve economies of time, effort, and expense, and promote…uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Accordingly, a central concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy.

Id. at 944 (internal quotation marks and citations omitted). This is a "far more demanding" standard than the commonality requirement of Rule 23(a). *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310-311 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001)).

7. *Superiority – Rule 23(b)(3)*

In addition to the "predominance" inquiry outlined above, a court must also find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation," and it is superior "if no realistic alternative exists." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The following factors are pertinent to this analysis: "(A) the class members' interests in individually controlling the prosecution or

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

B. TCPA

Under the TCPA, a plaintiff must prove (1) that the defendant called a cellular telephone number (2) using an ATDS (3) without the recipient's prior express consent. *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(b)(1)).[1]

In *Meyer*, the Ninth Circuit rejected the defendant's arguments that individualized issues of consent should preclude a finding of typicality or commonality because some debtors might have agreed to be contacted at any telephone number, since the defendant failed to point to a single case where consent was given. *Id.* at 1042. Similarly, "[d]efendants' speculation that customers may have given their express consent to receive text message advertising is not sufficient to defeat class certification." *Agne v. Papa John's Intern., Inc.*, 286 F.R.D. 559, 566 (W.D. Wash. 2012).

C. Expert Testimony

The court is required to apply the evidentiary standard set forth in *Daubert* to expert testimony at the class certification stage. *Ellis*, 657 F.3d at 982. "Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does

---

[1] There appears to be some confusion in the Ninth Circuit as to whether the lack of prior express consent must be proven by the plaintiff or whether it is an affirmative defense that must be proven by the defendant. *Cf. Grant v. Capital Management Services, L.P.*, 449 Fed. Appx. 598, 600, n. 1 (9th Cir. 2011) with *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 471 (S.D. Cal. 2014). However, for purposes of this Order, the Court will assume it is Plaintiff's burden.

not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Id*. (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145 (1999)).

"'[W]hen an expert's report or testimony is critical to class certification…a district court must conclusively rule on any challenge to the expert's qualifications or submission prior to ruling on a class certification motion.'" *Sher v. Raytheon Co.*, 419 Fed. Appx. 887, 890 (11th Cir. 2011) (quoting *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010)). This is required "even if those considerations overlap the merits of the case." *American Honda Motor Co., Inc.*, 600 F.3d at 815.

While "[i]n its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement,…it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits. Genuine disputes with respect to the Rule 23 requirements must be resolved, after considering all relevant evidence submitted by the parties." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 324.

III. DISCUSSION

A. Defendant's Motions To Strike Mr. Evdokimov's Testimony Are Denied

Defendant seeks to strike Plaintiff's Notice of Errata and to strike all testimony of Mr. Evdokimov as unreliable. (ECF Nos. 47, 51.) Unlike the cases cited in both parties' briefs, in this case, the class is readily ascertainable without resorting to expert testimony. Any individual whose telephone number is listed in the "Employment" or "Contact" section of a loan application, who was contacted for debt collection via an ATDS is a putative member of the class.

Mr. Evdokimov and his computer programs are being used solely as a vehicle to manage the vast numbers of individuals encompassed by this description. In other words, instead of identifying the class by manually listing all names and telephone

numbers and then trying to figure out which of these thousands of individuals was actually contacted by Defendant, Mr. Evdokimov is using his computer to cross-reference these telephone numbers. Obviously the data he is cross-referencing is only as good as the information that is being manually inputted. The difficulties he has had manually inputting these numbers and figuring out which numbers should be manually inputted goes to the difficulties of managing the class, but not to the actual identification of the class.

As Plaintiff points out, ultimately the method for ascertaining the class has not changed. Therefore, this Court declines to strike the Notice of Errata. The Notice of Errata simply points out that the original input of data did not include all third party contacts. In addition, the method Mr. Evdokimov is using to identify class members is based on reliable science and fairly simple computer cross-referencing methods. Therefore, Defendant's Motions to Strike Expert Testimony (ECF Nos. 47 and 51) are **DENIED**.

B. Class Certification Is Granted Under Rule 23(b)(3) and Denied Under Rule 23(b)(2)

1. *Requirements for Rule 23(a) Have Been Met*

As a preliminary matter, Defendant argues that the class is not ascertainable because the cellular telephone numbers identified by the Plaintiff could have changed over time. (ECF No. 54 at p. 21.) However, the members of the class are not being identified solely by their telephone numbers. The loan application requests information about a loan applicant's "Employer" with address and telephone number, and other "Contacts" with telephone numbers. (ECF No. 39 at Exh. F.) Presumably, if the telephone number no longer belongs to the individual identified as the Employer or Contact, this can be ascertained during class notification. Moreover, "[t]here is no requirement that the identity of the class members...be known at the time of certification." *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012) (citation and internal quotations omitted). The class definition is

definite enough so that it is administratively feasible for the Court to ascertain whether an individual is a member of the class. *See G.M. Sign, Inc. v. Finish Thompson, Inc*., 2009 WL 2581324, at *4 (N.D. Ill. Aug. 20, 2009) (finding TCPA class identifiable because "[plaintiff] may use the log and fax numbers to 'work backwards' to locate and identify the exact entities to whom the fax was sent."). Therefore, this Court finds the class is ascertainable.

a. Numerosity

Defendant does not raise any issue with respect to the first prong of Rule 23(a). Even if the class definition is amended to exclude any individuals whose telephone number appears in the "Personal" section of a loan application, the class has well over 1,000 members and is clearly so numerous that joinder of all members is impracticable.

b. Commonality

In addition, common issues exist within the class. Defendant argues that loan applicants gave "express prior consent" to contact all individuals listed in the loan application. (ECF No. 54 at p. 10.) Plaintiff argues loan applicants could not consent on behalf of third parties listed in the "Employment" or "Contacts" section of the application. (ECF No. 39-1 at pp. 3, n. 4 & 14; ECF No. 61 at p. 8.) Resolution of this legal issue will generate a common answer likely to drive the resolution of the litigation.

Defendant further maintains that class members may have different arguments regarding "prior consent" because some putative class members, that is, those individuals whose telephone numbers appear in the "Employment" or "Contacts" section of the loan application, could also be loan applicants who had given their prior consent to be contacted for debt collection. (ECF No. 54 at pp. 11-14.) Plaintiff responds by suggesting that the Court amend the class definition *sua sponte* to exclude from the class any loan applicants, that is, those individuals whose telephone number appears in the "Personal" section of a loan application. (ECF No.

61 at p. 2, n. 2.) Plaintiff's suggestion appears to resolve the concern that some class members may also be applicants. Therefore, this Court amends the class definition *sua sponte* to include:

> All persons whose 10-digit cellular telephone numbers with a California area code were listed by an account holder in the Employment and/or Contacts fields, **but were not listed in the Personal fields**, of a California customer loan application produced to [Defendant], which were called by [Defendant] using an ATDS and/or an artificial or prerecorded voice for the purpose of collecting or attempting to collect an alleged debt from the account holder, between August 13, 2008 and August 13, 2012.

(amendment in bold). With this amendment, this Court finds Defendant's arguments about individualized issues with respect to "express prior consent" are no longer valid.[2] Therefore, this Court finds there are questions of law common to the class.

c. Typicality

Again, by amending the class to exclude any individuals who are also loan applicants, the Court finds that Plaintiff's claims that he was listed solely as a third party contact on the loan application and thus did not give express prior consent are typical of the issues of the remaining class members.

d. Adequacy

Defendant argues that Plaintiff is an unsuitable representative because he has a 2000 felony conviction for sex with a minor. (ECF No. 54 at pp. 22-23.) The Court disagrees. First, Defendant fails to show how a conviction that is not for dishonesty, theft, or fraud is in any way relevant to Plaintiff's integrity as a class representative. Moreover, under Federal Rule of Evidence 403, it is highly unlikely that this conviction would even be admissible at trial. Even so, the age of the conviction and the dissimilarity between the conviction and the determination as to Plaintiff's ability to serve as a fiduciary leads this Court to find that Plaintiff is an adequate class

[2] As discussed below, the Court finds *Gutierrez v. Barclays Grp.*, 2011 WL 579238 (S.D. Cal. Feb. 9, 2011) to be distinguishable.

representative.

Defendant further argues that Plaintiff is not an adequate representative because he has been inconsistent in stating the remedies he is seeking and his "inconsistency may force potential class members to elect on potential remedies." (*Id*. at p. 22.) However, Plaintiff seeks both injunctive relief and monetary damages in his Complaint (ECF No. 1 at p. 8) and Motion for Class Certification (ECF No. 39-1 at pp. 19-20; ECF No. 39-16 at ¶10). Plaintiff further understands his responsibility to prosecute this case on behalf of the entire class. (ECF No. 39-16 at ¶¶8, 10.) Accordingly, the Court finds that Plaintiff is an adequate representative of the class.

2. *Because Plaintiff is Seeking Individualized Monetary Damages, Certification Under Rule 23(b)(2) Is Not Appropriate*

Plaintiff seeks certification under both Rule 23(b)(3) and Rule 23(b)(2). Since Plaintiff is seeking individualized monetary claims and not solely injunctive relief, certification is only proper under Rule 23(b)(3) as discussed below and not for final injunctive relief under Rule 23(b)(2). *See Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 579 (S.D. Cal. 2013). Therefore, Plaintiff's Motion for Class Certification under Rule 23(b)(2) is **DENIED**.[3]

3. *Plaintiff Has Established "Predominance" and "Superiority" Under Rule 23(b)(3)*

As discussed above, adjudication of the common issue of "express prior consent" of an individual who is a third party to a loan application will help achieve judicial economy in this case. It does not make sense to adjudicate this issue in thousands of smaller cases.

Defendant argues that, since individuals can, under certain circumstances, provide prior express consent to be called at a telephone number other than their own, class certification would require "mini-trials" to determine the third party's

[3] Notably, Defendant represents all contacts to third party individuals listed in the loan applications have now ceased.

relationship with the loan applicant. However, a quick look at the loan application (ECF No. 39 at Exh. F) distinguishes the facts in this case from those in the cases cited by Defendant. In this case, the loan application requests telephone numbers used by the loan applicant. In a separate "Employment" field, the loan application requests the name of the applicant's Employer, address and telephone number for the Employer, name of the applicant's supervisor and telephone number of the applicant's supervisor. (*Id*.) This is separate from the personal and work numbers where the applicant identifies he can be reached. *Cf. Gutierrez*, 2011 WL 579238, at *1 (plaintiff listed his wife's cellular number as *his* home phone number on a credit card application). Similarly in the other "Contacts" field of the application, the applicant is requested to list contacts, including "nearest relative not living with you" and "landlord" including these individuals' telephone numbers. This is separate from the telephone numbers where the applicant can be reached. Ultimately, this case can resolve the legal issue as to whether this factual scenario was sufficient to allow the Defendant to then reach out to these individuals assuming prior express consent. The overall factual scenario can be ascertained by looking at the loan application and this predominates over any individual factual scenarios. This is particularly true in light of the Court's amendment of the class definition to exclude any individuals who were actually loan applicants.

Defendant further argues that the plan for noticing the class is unworkable. (ECF No. 54 at pp. 17-18.) However, Plaintiff proposes using a reverse look-up to identify class members. (ECF No. 61 at p. 10.) The loan application also identifies names, telephone numbers and, in some cases, even addresses of putative class members. (*See* ECF No. 39 at Ex. F.) Noticing the class members is not any more unworkable than any other class involving thousands of members.

A class action is the superior method of proceeding in this case, particularly since there is a common question that predominates regarding express prior consent by a third party contact in a loan application. Therefore, Plaintiff's Motion for Class

Certification under Rule 23(b)(3) is **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Class Certification (ECF No. 39). The Court **GRANTS** Plaintiff's Motion for Class Certification under Rule 23(b)(3) with the Court's modification to the class definition as discussed above, and **DENIES** Plaintiff's Motion for Class Certification under Rule 23(b)(2). The Court further **DENIES** Defendant's *Ex Parte* Motion to Strike Plaintiff's Notice of Errata and Declaration of Ilya Evdokimov in support thereof (ECF No. 47) and **DENIES** Defendant's Motion to Strike the Report and Testimony of Ilya Evdokimov in support of Plaintiff's Motion for Class Certification (ECF No. 51).

IT IS SO ORDERED.

DATED: September 5, 2014

Hon. Cynthia Bashant
United States District Judge